2008

Robert S. Martin and Sarah B. Martin v. Larry J. Nielson and Julianne Nielson : Reply Brief

Utah Court of Appeals

M. Darrin Hammond; Smith Knowles; Attorneys for Appellants.
Paul H. Olds; Farr Kaufman; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

ROBERT S. MARTIN and SARAH B. MARTIN, Appellants, vs. LARRY J. NIELSON and JULIANNE NIELSON, Appellees.	Appellate Case No: 20080313

REPLY BRIEF OF APPELLANTS ROBERT S. MARTIN AND SARAH B. MARTIN

APPEAL FROM THE DECISION AND ORDER OF THE SECOND JUDICIAL DISTRICT

Farr Kaufman Paul H. Olds Bamberger Square Building 205 26th Street, Suite #34 Ogden, UT 84401 *Attorneys for Appellees*	Smith Knowles, P.C. M. Darin Hammond 4723 Harrison, Suite 200 Ogden, Utah 84403 *Attorneys for Appellants*

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

ROBERT S. MARTIN and SARAH B. MARTIN, Appellants, vs. LARRY J. NIELSON and JULIANNE NIELSON, Appellees.	Appellate Case No: 20080313

REPLY BRIEF OF APPELLANTS ROBERT S. MARTIN AND SARAH B. MARTIN

APPEAL FROM THE DECISION AND ORDER OF THE SECOND JUDICIAL DISTRICT

Farr Kaufman Paul H. Olds Bamberger Square Building 205 26th Street, Suite #34 Ogden, UT 84401 *Attorneys for Appellees*	Smith Knowles, P.C. M. Darin Hammond 4723 Harrison, Suite 200 Ogden, Utah 84403 *Attorneys for Appellants*

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Utah Code Ann. § 30-3-3

Cases

Mason v. Loveless, 24 P.3d 997 (Utah App. 2001)
Mark Technologies Corp. v. Utah Resources, 147 P.3d 509, 513 (Utah App. 2006)
Nielsen v. Pioneer Valley Hospital, 830 P 2d 270, 272 (Utah 1992)

Other Authorities

None

Rules

None

Treatises

None

Constitutional Provisions

None

I. THE COURT'S FINDING OF FACT THAT THE PARTIES AND THE PREDECESSORS IN INTEREST RECOGNIZED THE SHED AS A BOUNDARY LINE IS NOT SUPPORTED BY THE EVIDENCE.

In paragraph 2 of its Decision, the trial court stated, "There has existed, until recently, a shed that the parties and the predecessors in interest recognized as a boundary line." Decision, R.183 ¶2. However, there is no single witness who testified in support of that finding/conclusion.

- Ms. Drayer and Mr. Dixon (neither of whom are predecessors in interest) testified that the shed had been there for a very long time but neither of them testified that the back of the shed was considered by any party as a boundary line.

- There was no evidence that Mr Martin deemed the back of the shed to be the boundary line. In fact, he testified to the contrary when he testified that he had never agreed to that line as a boundary line since he moved into the property, (see, Transcript page 11, lines 5 – 7) that he has asked the Nielsons not to use the disputed property, and has asked them to remove the storage items. (See, Transcript page 11, lines 17 – 24.)

- There was no evidence that Mr Nielson deemed the back of the shed to be the boundary line In fact, Mr Nielson never testified as to what he thought was the boundary line With regard to a boundary line he stated, "Basically that there was a piece of property back there that where it started and where it stopped, who knew?" See, Transcript Page 68, Lines 10 – 11

- There was no evidence that Mr Martin's predecessor in interest deemed the back of the shed to be the boundary line

- There was no evidence that the predecessor in interest to Mr. Nielson believed the back of the shed to be a boundary line

The record is simply devoid of any statement by any of Appellee's witnesses including Mr Nielsen that the back of the shed was considered by anybody to be the

boundary line. The argument that Appellees have made concerning this lack of evidence is that the Court should draw inferences. However, it is reasonable to expect that the record would contain direct testimony, rather than inferences, to support the Court's conclusion that there was "a shed that the parties and the predecessors in interest recognized as a boundary line."

Even if the court could draw an inference from Mr. Nielson's testimony that he intended for the back of the shed to be the boundary line, that inference is overcome and not reasonably drawn because of Nielsen's contrary testimony that "there was a piece of property back there that where it started and where it stopped, who knew?" See, Transcript page 68, lines 10 – 11. In fact, the reasonable inference from this statement is that Mr. Nielson did not know where the boundary line was or that he was hoping the back of the shed would be the boundary. In either case, the testimony is insufficient to support the trial court's finding of fact that Nielsen owned up to the back of the shed.

The Appellee would have the court make an inference to fill in the gaps in the testimony. The inference that Appellee would have the court make is not reasonable in light of the record. Appellees would have the court draw an inference Mr. Nielsen believed that the back of the shed is the boundary line. Thus, while the court may possibly infer certain facts, any inferences should be reasonable in light of all of the testimony.

Mr. Martin testified that shortly after the Riverdale flood that he and Mr. Nielson had a conversation near the back of the shop. "During the course of conversation [Nielson] alluded to the fact that that was my property and he requested if I would be

interested in essentially squaring off both pieces of property, making it more advantageous to both of us, better access for me to – easier access for me to get behind my shop and store my car parts and things like that. And, you know, then square off his property by conveying over to him portion, a portion of that 40 by 100 foot piece." See, Transcript page 21, lines 19 – 25. Mr. Nielson never denied this conversation at trial and such a conversation does not in any way establish or tend to support his claim of boundary by acquiescence.

Boundary by acquiescence is a very limited doctrine intended to establish boundary lines according to mutual acquiescence in a given line as a boundary in limited situations. In order to establish such mutual acquiescence, there must be some intention by one party and acquiescence by the other party or their predecessors in interest to treat a line as the boundary. Mr. Nielson did not testify what he thought was the boundary nor was there any testimony of the predecessor in interest as to their understanding of treatment of the boundary.

While a Utah case states that acquiescence may be established by silence, (see, Mason v. Loveless, 24 P.3d 997 (Utah App. 2001), there is not silence in this case. Martin had assertively attempted to use the disputed parcel and claimed ownership thereof. (See, Transcript page 11 – 12). Mr. Martin's testimony as to his understanding of the boundary was that he owned the property on both sides of the shed. See, Transcript, page 11 line 19. There were no conversations or discussions between the Martins and the Nielsons where Martin agreed that the back of his shed was the boundary line between the properties. See, Transcript page 33, line 25 – page 34 line 3. Even Mrs.

Martin testified that in August of 1999 Mr. Nielson and Mr. Martin had a discussion where Mr. Nielson was trying to make arrangements with Mr. Martin about trying to acquire the piece of property behind the shop. See, Transcript page 72, line 22 – page 73, line 10. Martin also removed a tree from the premises which information was known to Mr. Nielson. See, Transcript page 13, line 6 – 11. Appellants believe that when all evidence is weighed there is insufficient evidence to find acquiescence in this case.

Further evidence of Martins' predecessor in interest's belief as to the boundary is the fact that he signed a warranty deed over to Martins containing all three parcels. (See, Warranty Deed admitted as Plaintiff's Exhibit #3.) It is reasonable to conclude that the Martin's predecessor in interest believed that he did own the property behind the shed because it was described as a separate parcel in the deed.

Appellees have claimed that Appellants did not adequately marshall the evidence. The only fact which Appellees raise that was not emphasized in the marshalling section of the opening brief is the fact that Appellees thought the disputed parcel was part of the property they purchased it. Transcript page 53, line 20 – 22. However, this statement was made without foundation. How Mr. Nielson could have thought he had purchased it is unclear from the plat map. The plat map clearly shows that he was not purchasing the disputed parcel. R.011. That is the only fact that Appellee raised which was not in the marshalling section of Appellant's brief. The inadvertent omission of just one fact does not make the marshalling inadequate. Moreover, this one additional fact does not cure the deficiencies in Appellees' *prima facie* case for boundary by acquiescence. They still have not met all four of the elements.

Appellees would further have the court defer to the trial court on issues of credibility. While the trial court can rely on credibility, credibility was never mentioned by the court in its Decision. The court never did state anything about the credibility of either of the witnesses. No such statement was made in the Decision nor was any credibility issue identified in the Findings of Fact and Conclusions of Law. Thus, a statement concerning credibility is out of line in an appellate brief when there is no such statement by the trial court itself.

II. THE COURT'S FINDING OF FACT THAT THE ACQUIESCENCE OCCURRED FOR AT LEAST TWENTY YEARS IS NOT SUPPORTED BY THE EVIDENCE.

In paragraph 2 of its Decision, the trial court further stated, "This acquiescence has occurred for a long period of time (defiantly more than 20 years)". R.183. However, the evidence does not support this conclusion as to a 20 year period. The Nielsons cannot testify as to anything that occurred prior to May of 1990. The other two witnesses, Ms. Drayer and Mr. Dixon only testified as to when the structures were built and did not give any testimony as to acquiescence for a long period of time.

Because this action was commenced in 2006, the twenty-year period had to have begun in 1986 or before. The Nielsons took occupancy in 1990. See, Transcript, page 52, line 21. There is no evidence as to how Mr. Nielson's predecessor in interest treated the boundary.

In order to support the above finding, a conclusion would have to be made to support that the shop was a boundary line prior to 1990. Appellees have stated that inferences have been ignored. Because the record is lacking any evidence as to how Mr. Nielson's predecessor in interest treated the disputed parcel, prior to 1990, no reasonable inference can be made. Based on this, the Nielsons' twenty-year period cannot begin until 1990. If we infer that Mr. Nielson assumed that the boundary line was the back of the shop then that is the extent of the inference because his testimony only goes back to 1990. No such inference can be drawn from the testimony of either of Appellee's other two witnesses who were only useful to testify as to when the structures were built. Mr. Dixon and Ms. Drayer were only long time neighbors. They had no knowledge as to how the predecessors treated the boundary. Thus, even after drawing inferences, the Nielsons cannot establish all four elements of their *prima facie* case for boundary by acquiescence.

Appellant has not found any case law where inferences are drawn in order to establish a *prima facie* case at trial. Appellees have the burden of proving their *prima facie* case by a preponderance of the evidence. See, Mark Technologies Corp. v. Utah Resources, 147 P.3d 509, 513 (Utah App. 2006). A case full of inferences cannot meet the burden of a preponderance. The mere fact that there is a boundary issue does not establish a *prima facie* case. The inferences to be drawn should be clear and satisfactory, not just a way to cover up major deficiencies in the principal case. It seems that the case law requires that the court find by preponderance of the evidence the elements before an inference can be drawn in the circumstances. See, Nielsen v. Pioneer Valley Hospital, 830 P.2d 270, 272 (Utah 1992). This further shows that inferences may be rebutted by

other evidence. Inferences must be those that may properly be deduced from the circumstances. The neighbors simply were not competent to testify about the boundary line shared by other property owners.

III. ATTORNEY'S FEES ARE NOT ALLOWABLE.

Appellees' attempt to claim attorney's fees is without merit. Attorney's fees are only awarded where there is a statute or a contract allowing for the same. No statute or contract is involved in this boundary dispute which could possibly support an award of attorney's fees. Appellees have not even alleged bad faith. The statute cited by Appellees in support of their argument for attorney's fees is Utah Code Ann. § 30-3-3 which is a divorce statute! It is offensive that Appellees would cite to a divorce statute as a basis for awarding attorney's fees in a boundary matter.

CONCLUSION

It is significant that no single witness for the Nielsons testified that the back of the shop was deemed by any of them to be the boundary between the two parcels. It is also significant that none of the Appellees' witnesses testified as to acquiescence prior to 1990. The statements made at trial taken as a whole, are insufficient to make Appellees' case for boundary by acquiescence. Because there is not enough evidence as to all elements of boundary by acquiescence, the trial court's conclusion should be reversed and the case remanded.

DATED this 29 day of October, 2008.

SMITH KNOWLES, P.C.

M. Darin Hammond
Attorneys for Appellants Robert S. Martin and Sarah B. Martin

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed by first-class mail with postage fully prepaid this 29 day of October, 2008, to each of the following:

Paul H. Olds
FARR KAUFMAN
Bamberger Square Building
205 26th Street, Suite #34
Ogden, UT 84401

~~Legal Assistant~~